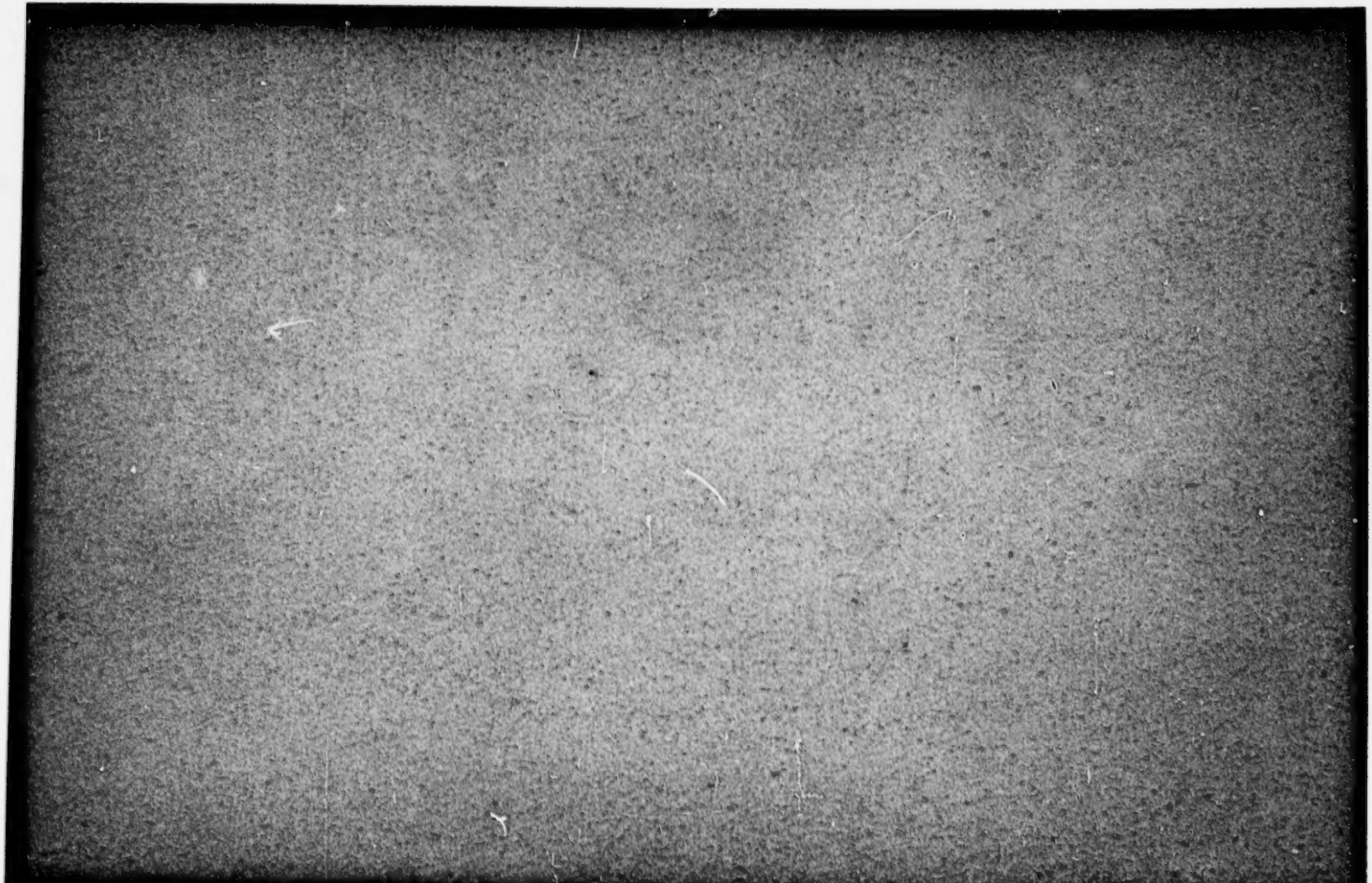

SUPREME COURT, U. S.
FILED
DEC 2 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; JAMES LAMBERT; C.H. BARRET: AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of California

PETITION FOR REHEARING

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PEOPLE'S LOBBY PRESS, LOS ANGELES

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PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its order of October 15, 1974 denying the petition for writ of certiorari in this case, Mr. Justice Douglas and Mr. Justice Stewart being of the opinion that the petition should be granted, and (2) granting the petition. On October 31,

1974 Mr. Justice Brennan extended the time in which to file a petition for rehearing to and including December 9, 1974.

Rehearing is sought because of the following intervening circumstances:

1. Amendments to the California Constitution effective November 6, 1974;

2. Amendments to the California Government Code effective January 7, 1975;

3. Comments of Chief Justice Warren Burger reported on October 15, 1974

If rehearing is granted and certiorari is granted, this Court should resolve the constitutional issues presented in the petition for certiorari in light of the enumerated intervening circumstances. At a minimum, this Court should grant certiorari, summarily vacate the judgment of the California Supreme Court, and remand the case to that court for reconsideration of its four-to-three decision in light of the substantial intervening circumstances which have occurred at the state level.

I. AMENDMENTS TO CALIFORNIA CONSTITUTION

On November 5, 1974 the California electorate voted to amend the California Constitution, and the amendments became effective on November 6, 1974. Article I, Sections 9 and 10 (the free speech and petition provisions of the California Constitution, Pet.App. A., pp. A2-A3)

were repealed.

Justice Mosk, writing for the three dissenters on the California Supreme Court, based his decision partly on Article I, Section 9 of the California Constitution (Pet.App. O, p. A114).

Although Sections 9 and 10 were repealed by the California electorate, substantially similar provisions were added to the California Constitution. Article I, Section 2 now provides as follows:

> "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article I, Section 3 now provides as follows:

> "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

It should be noted that the new "petition clause" is broader than the old (Article I, Section 10) because the right to petition has been extended from the right to petition the "Legislature" to the right to petition "government."

More important than the changes noted above is the addition of Article I, Section 24 to the California Constitution:

> "Rights guaranteed by this

Constitution are not dependent on those guaranteed by the United States Constitution.

This declaration of rights may not be construed to impair or deny others retained by the people."

The addition to the California Constitution of this amendment is a significant intervening circumstance. It goes to the heart of the dispute between Justice Burke's four-justice majority opinion and Justice Mosk's three-justice dissenting opinion. Justice Mosk concluded that petitioners' rights were protected by the California Constitution, which afforded petitioners greater rights than they possessed under the federal constitution. Justice Burke did state that the question was being left open (Pet.App. O, p. 104) because, in his view, Lloyd v. Tanner, 407 U.S. 551 (1972), is based on the property right of the shopping center, not the absence of a First Amendment right in the leaflet distributor. As noted in the petition for certiorari, there is great uncertainty in the lower courts and among the legal commentators as to the precise meaning of Lloyd v. Tanner. Pet. pp. 36-37.

This constitutional change alone requires, at a minimum, this Court to vacate summarily the judgment below and remand with directions to the California Supreme Court to reconsider its opinion in light of the change. Parenthetically, it should be noted that Justice Burke retired from the California Supreme Court on November 20, 1974, leaving a three-to-three split on the issue. Perhaps the

vote of his replacement will make the difference (just as the loss of the late Justice Raymond E. Peters from the first six-to-one Diamond v. Bland majority apparently led to the second four-to-three reversal (Justice Clark, Peters' replacement, voted to overrule the prior decision)). (Mr. Justice Marshall dissenting in Lloyd v. Tanner, 407 U.S. 551, 584 (1972), recognized the effect of the composition of a court upon the decision it renders.) (It also perhaps should be noted that Secretary of State Edmund G. Brown, Jr., who filed an amicus curiae brief in support of petitioners in the California Supreme Court (Pet.App. M, pp. A91-A98) was elected Governor of California on November 5, 1974. Governor-elect Brown, in view of the denial of certiorari, cannot determine whether to seek a statute specifically authorizing the utilization of shopping centers for the circulation of initiative petitions. It is not clear whether such a statute would be constitutional. The present opinion of the California Supreme Court indicates that in its view this Court would strike it down. Yet this Court has not spoken. The California Legislature will not enact a law the California Supreme Court believes would be invalid. Petitioners cannot enact such a statute by an initiative petition without access to shopping centers.)

II. LIMITATION ON EXPENDITURES; CALIFORNIA GOVERNMENT CODE

Another significant intervening circumstance is the addition of Sections 85200 and 85201 to the California Government

Code regarding the limitation on expenditures which may be incurred in the circulation of statewide initiative petitions. These sections will become effective on January 7, 1975. They provide as follows:

> "85200. No person shall incur any expenditure in furtherance of a circulation or qualification of a statewide petition without the express or implied authorization of the proponent. For purposes of this article, 'expenditure' does not include:
>
> (a) Unreimbursed expenses incurred by a circulator incidental to his circulation of the petition;
>
> (b) Expenditures for advertising or speech regarding the measure unless the advertising or speech is directly incidental to circulation of the petition.
>
> "85201. Not more than twenty-five cents ($0.25) multiplied by the number of signatures required for qualification, adjusted for cost of living changes, shall be spent in furtherance of the circulation or qualification of a statewide petition."

Throughout the litigation in the instant case there has been no limit on the amount of money which could be spent to circulate and qualify a statewide initiative petition for the ballot. The absence of any restriction on the expenditure of funds to collect signatures

on petitions is inextricably related to the major premise of the majority opinion of the California Supreme Court, i.e., that there are effective, alternative methods of gathering signatures on petitions. As Secretary of State Edmund G. Brown, Jr., pointed out in his amicus brief, many California initiative petitions qualified for the ballot because of the financial resources of the proponents of the measures. If cost is not a factor, promoters of initiative petitions might be able to pay persons to go door-to-door in the communities and gather signatures in this time consuming and expensive fashion. Thus, with no financial limitation, effective, alternative means of circulating initiative petitions may exist (which petitioners do not concede). However, the limitation on expenditures for qualifying initiative petitions will force all proponents to seek locations where numerous signatures can be gathered with little expense, such as shopping centers. Secretary of State Brown noted in his amicus brief the relationship between the availability of alternatives and the cost of qualifying initiative petitions. Indeed, he anticipated the enactment of financial limitations. Governor-elect Brown stated in his brief,

> "Finally, proposals to limit circulation expenditures or to prohibit payment to circulators are pending before the Legislature. If any of these proposals are enacted and if the opinion of the District Court of Appeals (sic) is affirmed, the result could well

be to make the qualification of an initiative petition a practical impossibility under any circumstances." Pet.App. M, pp. A96-A97.

In view of the new financial restrictions on expenditures to qualify initiative petitions for the ballot and the significance to the majority of the California Supreme Court of the availability of alternative (but obviously more expensive) methods of petition circulation, at a minimum this Court should vacate the judgment of the California Supreme Court and remand to that court for the purpose of permitting it to reconsider its opinion.

III. COMMENTS OF THE CHIEF JUSTICE

Statements made by the Chief Justice were published in the Los Angeles Daily Journal on October 15, 1974, the same day certiorari was denied. The Chief Justice announced his concern about the increasing workload of the Court. A copy of the article is included as an appendix to this petition.

The action of the Court in denying certiorari can only lead to an increase in litigation, both state and federal, with the resulting continued and increased burden on this Court which the Chief Justice apparently would like to see lessened. By denying certiorari in this case, which involves the right of the initiative guaranteed by the constitutions of twenty-one states, this Court has necessarily made it much more difficult, indeed impossible in most cases, for citizens of these states to partici-

pate in that form of the legislative process known as the initiative. Without shopping center access, citizens simply cannot gather enough signatures in the time allotted to qualify a measure for the ballot.

Often, the subject of a citizen initiative drive is the same as a lawsuit. The instant case is an excellent example. It involves an attempt to enact anti-pollution legislation by the initiative process.

When the legislative system fails (initiative or representation), persons turn to the judiciary. Thus, the battleground for clean air shifted to the judiciary. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973); City of Chicago v. General Motors Corporation, 467 F.2d 1262 (7th Cir. 1972); Diamond v. General Motors Corp., 20 Cal.App.3d 374, 97 Cal.Rptr. 639, 47 A.L.R. 3d 759, 3 E.R.C. 1227 (1971). Some air pollution cases have reached this Court on appeal, e.g., City of New York v. United States, 397 U.S. 248 (1970), and some have been brought as original proceedings, e.g., Washington v. General Motors Corp., 406 U.S. 109 (1972).

Numerous other social problems which are brought to the judiciary could be solved by the legislative process. By limiting the legislative process, this Court forces frustrated citizens to turn to the courts for help. The Chief Justice has previously stated his preference for legislative solutions to social problems. See United States v. Richardson, ___ U.S.

___, 41 L.Ed 2d 678, 689-690 (1974) and Schlesinger v. Reservists to Stop the War, ___ U.S. ___, 41 L.Ed 2d 706, 716-722 (1974).

A decision in favor of petitioners would result in a reduction in the workload of this court, and the workload of the judiciary in general. The more opportunities citizens have to participate in the legislative process, the less will be the demands they place on the judiciary. Obvious also is the fact that the availability of the initiative process reduces the likelihood that frustrated citizens will resort to socially unacceptable methods to accomplish their goals.[1]

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and either hear this case on its merits or summarily vacate the judgment below and remand to the California Supreme Court for reconsideration of its opinion in light of the intervening circumstances enumerated herein. On a

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1. A statute adopted by the initiative process may lead to judicial action if it is unconstitutional. This is true of any statute. An initiative statute was declared violative of the state and federal constitutions by the California Supreme Court in Weaver v. Jordan, 64 Cal. 2d 235 (1966).

previous occasion in this case the Chief Justice and Justice Blackmun voted to grant certiorari and also voted to grant a rehearing, Homart Development Co. v. Diamond, 402 U.S. 988 (1971); 405 U.S. 981 (1972). Now Justices Douglas and Stewart favor the granting of certiorari. Petitioners respectfully urge this Honorable Court to grant the rehearing requested.

Respectfully submitted,

Roger Jon Diamond

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Pacific Palisades
California 90272

(213) 454-1351

Attorney for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of this Court.

Roger Jon Diamond

ROGER JON DIAMOND
Counsel for Petitioners

APPENDIX A

Los Angeles Daily Journal, Oct. 15, 1974

Burger Complains Of High Caseload

Supreme Court to Begin Hearing Record Number of Appeals Today

WASHINGTON (UPI)—The Supreme Court begins its first week of hearing oral arguments in its new term today, and Chief Justice Warren E. Burger says the workload is getting out of hand.

Burger has frequently complained about the number of cases the court must consider and said in a statement Sunday there is a "serious need for new solutions for the court's growing workload."

The justices considered a record 1,000 appeals of various kinds during last week's conferences. Only a small fraction will be scheduled for oral arguments and a written decision by the court.

Burger said that since he took his seat five years ago there has been a 40 percent increase in the number of appeals considered in the first week.

There were more than 5,000 appeals coming to the high court last year, up from 2,000 some 25 years ago he said.

But Justice William O. Douglas, who has been on the court longer than anyone in history, disagrees, saying he is able to complete his work in four days instead of five.

Official court statistics released with Burger's statement reveal that Douglas is the most prolific of the justices, writing more opinions, concurrences and dissents than anyone else.

Douglas was credited with 65 written opinions and memoranda last term, far ahead of Byron R. White, who wrote 40. Burger, whose duties include overseeing the entire federal judicial system, wrote the fewest, 19.

Douglas dissented 43 times, more than any other colleague, and if the court deals with major civil liberties cases this term, he may be a frequent dissenter again.

An analysis of court actions last year showed it did not extend any civil liberties measures, but neither did it overrule any, according to a survey by the American Jewish Congress.

The AJC analyzed 77 civil liberties cases decided last term. It found that the high court ruled in favor of those parties seeking to assert a right in 36 instances and against them in 40.

The decisions included such issues as school desegregation, obscenity rulings and several cases involving other forms of free speech.

Douglas was, in the AJC's opinion, the most consistently liberal member of the court, voting for expanded civil liberties in 70 of 75 decisions.

The court's newest member, William Rehnquist, was the most conservative. He voted for civil liberties positions in only 18 of the 76 decisions in which he was involved.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for petitioners.

On 11/27, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petition for Rehearing to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

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San Bernardino Superior Court
351 North Arrowhead Avenue
San Bernardino, Calif. 92401

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California Supreme Court
350 McAllister Street
San Francisco, Calif. 94102

I further certify that all parties required to be served have been served.

Roger Jon Diamond

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